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In The Supreme Court Of The United States

OCTOBER TERM 1993

GERALD J. SNYDER

PETITIONERS,

VS.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE; CONSOLIDATED FREIGHTWAYS, INC. A CALIFORNIA CORPORATION; AND CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL 150, AN UNINCORPORATED LABOR ORGANIZATION.,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION

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10PP

THE QUESTIONS PRESENTED FOR REVIEW

1. In view of Section 301, Labor Management Relations Act, is Restatement (2nd) Contracts, § 207, an interpretation favoring the public, the proper standard in the construction of a Collective Bargaining Agreement to protect the interests of intended third party beneficiary Union members who have no direct control over the collective bargaining process?

2. Did Appellant produce sufficient evidence to demonstrate a genuine triable issue of fact with respect to his claim of a breach of a duty of fair representation by Union in the failure to timely file a protest?

3. Did Appellate produce sufficient evidence to demonstrate a genuine triable issue of fact with respect to his claim of a breach of the collective bargaining agreement by Consolidated in failing to honor 40 trips?

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RESPONDENTS.

Petition for Writ of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

PETITION

OPINIONS BELOW

There is no published opinion from the lower courts. The Opinion of the Ninth Circuit is set out at page 1 of the Appendix. The Opinion of the Trial Court is set out at page 7 of the Appendix.

JURISDICTIONAL STATEMENT

1. The decision of the United States Court Of Appeals For The Ninth Circuit affirming the district court was filed on January 28, 1994.

2. Petitioner believes that 28 U.S.C. § 1254(1) and 2101(c) and Supreme Court Rule 13.1 confer *jurisdiction* on this court because the petition seeks review of an action within 90 days of the entry of judgment.

STATUTORY PROVISIONS INVOLVED

A. 29 U.S.C. § 141. SHORT TITLE; CONGRESSIONAL

DECLARATION OF PURPOSE AND POLICY.

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. (June 23, 1947, c. 120, § 1, 61 Stat. 136.)

B. 29 U.S.C. § 151. FINDINGS AND DECLARATION OF POLICY.

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured

or processed goods from or into the channels of commerce, or the prices of such materials or good in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to

eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collectively bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. (July 5, 1935, c. 372, § 1, 49 Stat. 449; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 136.)

C. 29 U.S.C. § 158. UNFAIR LABOR PRACTICES

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) *****

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; ****

(4) to discharge or otherwise discriminate against and employee because he has filed charges or given testimony under this subchapter;

*****

(b) It shall be an unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce (A) employees ... (B) an employer ...

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect

to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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D. 29 U.S.C., § 401. STANDARDS OF FINDINGS, PURPOSES, AND POLICY

"(a) Standards for labor-management relations.

The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

(b) Protection of rights of employees and public.

The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other

failures to observe high standards of responsiblity and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

(c) Necessity to eliminate or prevent improper practices.

The Congress, therefor, further finds and declares that the enactment of this chapter is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor-Management Relations Act, 1947, as amended [29 U.S.C.A. § 141 et seq.], and the Railway Labor Act, as amended [45 U.S.C.A. § 151 et seq.], and have the tendency or necessary effect of burdening or obstructing commerce by (1) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (2) occurring in the current of commerce; (3) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed good into or from the channels of commerce, or the prices of such materials or goods in commerce; or (4) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing into or from the channels of commerce. (Pub.L. 86-257, § 2, Sept. 14, 1959, 73 Stat. 519.)

E. 29 U.S.C. § 411(A)(4).

No labor organization shall limit the right of any member thereof to institute an action in any court, or in any proceeding before any administrative body, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator; *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof; *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

JURISDICTION OF DISTRICT COURT

District Courts have original *jurisdiction* of any civil action authorized by law to be commenced by any person under Section 301 of the Labor Management Agreement for breach of a duty of fair representation and a breach of the collective bargaining agreement.. 28 USC § 1331; 29 U.S.C., § 185(c).

STATEMENT OF THE CASE

A. HISTORY OF THE CASE.

A complaint was filed on June 24, 1991, alleging two causes of action under 29 U.S.C., § 185, to wit, A breach of a duty of fair representation as to the Union, and Breach of Contract/Repudiation of Contract as to Consolidated Freightways (CF). Defendants filed a timely answer. An amended complaint was filed by stipulation of the parties on October 21, 1991.

After the exchange of witness lists and completion

of discovery, defendants brought on motions for Summary judgment; all motions and the schedule for trial were continued by stipulation of the parties, with the Court's Consent.

Defendant Union filed its motion consisting of a Separate Statement with Exhibits A to D, two declarations, and a memorandum of points and authorities. Defendant CF filed two documents which joined Union's motion, without adding anything. Petitioner filed an opposition, citing his *verified* complaint, exhibits, and depositions in opposition.

The exhibits, as admitted to by the defendants showed that Plaintiff had 52 trips with CF. The heart of the dispute centered on whether 40 of those trips, within a qualifying period, met the criteria of the collective bargaining agreement (CBA), and on how the CBA should be construed, with Union and CF contending the court was bound by the construction urged by the "experts" from Union and CF, and petitioner contending that the Court was required to take the objective approach favoring protection of the public interest in protecting Union members.

The Trial Court found that for plaintiff to prevail in this hybrid action, he must show that the employer violated the collective bargaining agreement; that is, plaintiff had a meritorious grievance and that the union's conduct in handling the grievance constituted a breach of the duty of fair representation under federal law. (Excerpt, p. 233.) The court explained "Plaintiff contends that the union breached its duty of fair representation by failing to timely file a protest of his termination and by withdrawing the formal grievance it[1] eventually filed without notice to him. These claims fail because of the great difference the Court must give a union's handling of those grievances. To

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[1] In point of fact, the Union refused to file the complaint. Appellant filed it himself. The Union withdrew the complaint.

breach the duty of fair representation, a union's conduct must be shown to be arbitrary, discriminatory, or in bad faith. That's the holding of *Vaca vs. Sipes*, cited by the defendants where the challenged conduct involves a union's judgment as to how to handle a grievance, the conduct is not deemed arbitrary. That's the teaching of *Peterson v. Kennedy* cited by the defendants." The court reviewed the statement of Ken Christopher regarding Plaintiff's complaint (Expert pp., 234-35) and then found that plaintiff offered no evidence whatsoever to refute Christopher's affidavit, and that plaintiff made no request for a protest, and that Plaintiff understood the two step process, including the 10 day limit. The court went on to find that the handling of the grievance required the exercise of judgment on the part of the Union Officials. As such, it cannot be said to be arbitrary. The court also found that plaintiff had failed to produce any evidence to demonstrate that the Union's conduct was in bad faith or discriminatory. (Excerpt, p. 235-36.)

As to the breach of the collective bargaining agreement, it found that a supplemental driver, such as plaintiff, became eligible for permanent employment after forty tours of duty within a consecutive four months period. The employer then has 30 days within which to determine that the employee meets employer's standards and place him on the preferential hiring list, or to terminate him. During the probationary period, the employee may be terminated at will without cause. The court noted plaintiff's claim that he completed forty tours on December 5, 1990, and thus the employer had to make the decision to place him on the preferential list by January 5, or terminate. Because the employer did not act until January 8, 1990, the court noted, plaintiff's claim that he became an employee who could only be terminated for cause. (Excerpt, p. 236-37.) The court then observed "Defendants submit evidence that plaintiff had erroneously interpreted the collective bargaining

agreement's definitions of what constitutes a completed tour of duty and therefore has incorrectly computed the date on which he actually completed his forty tours. Defendants claim that that date was December 28, 1990, and thus the termination on January 8, 1990 was well within the thirty day period allowed under the collective bargaining agreement. The collective bargaining agreement sets forth what constitutes a tour of duty, however, the terminology used is not defined. Defendants submit evidence by way of declarations as to the correct interpretation of the terms used in the collective bargaining agreement. Plaintiff has failed to come forward with any evidence to show either that defendant's interpretation of the collective bargaining agreement is wrong or that their method of calculating tours is unreasonable. In addition, plaintiff has not explained his method for calculating tours nor submitted any evidence that his method is superior to that of the defendants, nor has he submitted any evidence to counter the four declarations submitted by the defendants of a union official and employer official and two fellow truck drivers, all of whom are familiar with the methodology of computing tours of duty under their collective bargaining agreement." (Excerpt, pp. 237-38.)

The court went on to find that on that state of the evidence, Plaintiff had not met his burden to establish the existence of a genuine issue of material fact. The court found that the evidence tendered by plaintiff were not relevant to the calculation of tours, and that the statements in support of Plaintiff's claim that the calculation, or termination, was pretextual, i.e. someone did not like him, was not relevant. The court based on the forgoing, granted Defendants' motions for summary judgment and denied their motions for sanctions. (Excerpt, p. 238.)

B. SUMMARY OF THE CASE.

Plaintiff has alleged two causes of action, one

against the Union for breach of a duty of fair representation, and one against CONSOLIDATED FREIGHTWAYS[2] for breach of the collective bargaining agreement (CBA), duty of fair dealing, or repudiation of the CBA. The action arises out of Plaintiff's termination on January 8, 1991.

The Collective Bargaining Agreement in force at the time of hire, in pertinent part, is set out in the appendix. In support of his motion for summary judgment, Plaintiff tendered the Collective Bargaining Agreement itself, Excerpts from the **Verified** Complaint bearing on Plaintiff's tours of duty, and excerpts from the depositions of Rudolph and Plaintiff. (Excerpt, pp., 146, 168, 170, and 185.) He also tendered four declarations bearing on the credibility of Defendants' witnesses regarding false claims made concerning Plaintiff's conduct. (Excerpt, pp. 198 to 203.) He also tendered a chart comparing the four known drivers which demonstrates that the drivers claimed to be more qualified were not. (Excerpt, p. 206.) Plaintiff brought to the court's attention, the prior claim of Christopher wherein Christopher concealed the fact that the grievance was not timely. (Excerpt, p. 143A.; Excerpt, p. 223A.)

Appellant claimed that he had forty tours of duty within the meaning of the Collective Bargaining Agreement, and tendered with his verified complaint his logs. These logs were tendered by Defendants. (Excerpt, pp. 14 to 78.) Appellees did not identify which, if any, of the tours do not qualify in their separate statement of uncontroverted facts.[3] (Excerpt, p. 1

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[2] There are in fact two Consolidated Freightways, one a Delaware Corporation, and the other a California Corporation, which are related corporations. For the purpose of this motion, they are treated as one entity for simplicity.

[3] Evidence of Plaintiff's tours of duty are attached to the complaint as exhibits and as Exhibit A to defendants' motions for summary judgment.

to 6.) As an example, Plaintiff alleges that Exhibits 17 and 18 (Excerpt pp. 19 and 20.) show two turn around dispatches, but in Response to Request for Admissions, CONSOLIDATED denied that either dispatch was a turn around dispatch.

Snyder went to the Union the day he received the Notice to protest, and the Union acted upon it. (First Amended Complaint, Exhibit 81; Excerpt, pp. 143; 223A.) Thus he was timely in going to the Union. Snyder filed out the grievance papers on February 5th, well within the 45 days of Article 45. As it turns out, Union failed to file a protest within 10 days. (Appendix, page 34.)

Evidence was presented tending to show that malicious gossip was spread around about Appellant. (Deposition of Rudolph, Excerpt, pp. 188-92.) Four witnesses testified that the information concerning Plaintiff was false. (Declaration of Preston, Luttrell, and Roby, Excerpt pp. 198-203.) Burkhalter gave two ambiguous versions of driving operations. (Excerpt, p. 203 (In support of Plaintiff; defines terms), p. 214 (In support of Defendant; how to count short runs).

Both the trial court and the appellate court rejected Petitioner's arguments that the Collective Bargaining Agreement had to be construed objectively through the lens of Restatement (2nd) Contracts, § 207, and accepted at face value the construction, against Petitioner, that Petitioner did not have the 40 trips required to establish a right to preferential hire. Both courts also rejected all of the evidence offered by Petitioner as not responsive to any of the issues.

C. Remedy Sought.

Petitioner seeks in this court a reversal and remand for further proceedings not inconsistent with this court's decision.

REASONS FOR GRANTING WRIT

I.

BY REJECTING AN OBJECTIVE APPROACH TO THE CONSTRUCTION OF THE COLLECTIVE BARGAINING AGREEMENT THE LOWER COURTS DECIDED AN IMPORTANT QUESTION IN A WAY THAT CONFLICTS WITH DECISIONS OF THIS COURT

A. THIS COURT HAS INDICATED A PREFERENCE OF USING RESTATEMENT TO FILL THE CONGRESSIONAL LACUNA IN LABOR LAW

In other Labor Law contexts, the Court has turned to the use of restatement to ascertain the federal law. *Scindia v. De Los Santos*, 451 U.S. 156, (1981) (Rejecting 9th Circuit's approach in Maritime Borrowing Statute use of Restatements).[4] Because the courts are required to give difference to the decision of arbitrators in the construction of Collective Bargaining Agreements, the court has rarely had the opportunity to fashion rules of construction. *E.g., Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1959). Nonetheless, the court has had some occasions to review a CBA and to provide some guidance in the construction of such contracts, where the controversy came to the court

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[4] In *Rehmar v. Smith*, 555 F.2d 1362 (1976), the court declined to apply a rule of construction which provides for an interpretation against the draftsman. That case is *distinguishable*, and probably no longer represents the rule in this circuit. First of all, the court noted that it was unclear who drafted the provision under scrutiny, hence it was unclear who to construe against. This case represents construction in favor of public policy to protect employees, requiring a construction against **both** employer and union, hence who drafted what is not relevant. Second, the court adopted a rule utilizing state law for a construction of the CBA. This we now know is clearly contrary to U.S. Supreme Court precedent. *Walsh, supra* at 407-08; *Lingle*, at 407. Third, by *Scindia*, the 9th Circuit approach has been found wanting. Fourth, the 9th Circuit views has shifted. *Hayden v. Reickerd*, 957 F.2d 1506 (9th Cir. 1992).

outside the grievance process. *Generally, Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988); *Walsh v. Schlecht*, 429 U.S. 401 (1977). The first principal is ""that state courts ... apply federal law in exercising [such] jurisdiction" and that "incompatible doctrines of local law must give way to principals of federal labor law." [Cites.] Application of federal law is necessary to avoid the "possibility that individual contract terms might have different meanings under state and federal law . . . ." *Walsh, supra* at 407-08. *Lingle* follows this general approach, marking out the boundaries for permissible and impermissible standards for the application of state rules, and the construction of the CBA.[5]

What is at issue is whether a rule of construction is emerging which would foreclose "unions and employers to exempt themselves" from the contractual obligations in a CBA in situations as at bench were a third party employee beneficiary brings suit against both. That is the rule. The court uses general principals of contract law for guidance. For instance, in *Walsh* the court observed "Since a general rule of construction presumes the legality and enforceability of contracts, 6A A. Corbin, Contracts §§ 1499, 1533 (1962), ambiguously worded contracts should not be interpreted to render them illegal and unenforceable where the

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[5] *Lingle* went on to observe, on a point not directly at issue herein, *distinguishing* between the application of state law to interpret a CBA on the one hand, and whether state law may be applied in an Employer-employer relationship regulated by the CBA on the other, to make this fine point: "[T]o show retaliatory discharge, the plaintiff must set forth sufficient facts .... Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither element requires a court to interpret any term of the collective bargaining agreement... Thus the state-law remedy ... is "independent" ... for § 301 purposes: ....", and thus not preempted. *Lingle*, at 407. The 9th Circuit followed *Lingle* and observed "A contrary rule ... would permit unions and employers to exempt themselves from state labor standards.

wording lends itself to a logically acceptable construction that renders them legal and enforceable." *Walsh*, at 408; *accord, Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957); *D.E.W. v. Local 93*, 957 F.2d 196, 199 (5th Cir. 1992). Where the contract is not ambiguous, the disagreement of the parties does not control, as it is a pure question of law susceptible to motions for summary judgment, but if there is an ambiguity, it is a question of fact precluding summary judgment. *D.E.W.*, 957 F.2d, at 199. In *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1959), the court was required to construe the contract to determine whether the employer was obligated to follow the grievance procedure, for if it was not, then the courts and not the arbitrator would be the decision maker. The court reasoned: "Yet to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. **Doubts should be resolved in favor of coverage.** [Emphasis added]" *Steelworkers v. Warrior & Gulf*, 363 U.S., at 574; *accord, Steelworkers v. American Mg. Co.*, 363 U.S. 564 (1959). The rule of resolving doubts in favor of coverage is in conformity with the general rule of construction of contracts favoring coverage to avoid forfeitures. *Great Lakes Transit Corp. v. Interstate S.S. Co.*, 301 U.S. 646 (1936); *Stroehmann v. Mutual L. Ins. Co.*, 300 U.S. 435, 439 (1937); *Aschenbrenner v. United States Fidelity & G. Co.*, 292 U.S. 80 (1934); *Williams v. Union Cent. L. Ins.*, 291 U.S. 170 (1934); *Philadelphia, W. & B.R. Co. v. Howard*, 54 U.S. (13 How.) 307, 340 (1851). These rules of construction have been applied in other contexts of the Labor Relations

matrix. *Ingersoll-Rand Co. v. Perry McClendon,* 111 S.Ct. 478 (1990); *Nachman Corp. v. Pension Guarantee Corp.*, 446 U.S. 359, 374-75 (1979) (Avoidance of forfeitures). Federal labor law, in all contexts, is viewed as remedial and designed to protect employees' benefits. *Smith v. CMTA-IAM Pension Trust,* 746 F.2d 587 (9th Cir. 1984). The Labor-Management Relations Act is remedial to redress perceived wrongs, one of which was the perceived imbalance of power between labor and management, and sought to accomplish that result by conferring certain affirmative rights upon employees by restricting employer and union activity for the protection of employees. *Generally, N.L.R.B. v. Allis-Chambers Mfg. Co.*, 388 U.S. 175, 179-82 (1967), *rehrg den.* 389 U.S. 892 (1967); *Breininger v. Sheet Metal Workers,* 493 U.S. 67, 86-87 (1989). It is also clear that neither the employer, the Union, nor both acting in concert, can amend the CBA except in a manner authorized by law, and their joint interpretation cannot be given effect if it amends what is otherwise clear language. *Local No. 3, UPWA CIO v. N.L.R.B.*, 210 F.2d 325 (5th Cir. 1954), *cert. den.* 348 U.S. 822 (1954); *accord, American Newspaper Pub. Ass'n v. N.L.R.B.*, 345 U.S. 100 (195). Another primary interest is to protect the public interest and policies by mitigating the effects of violation and preventing future violations. *Marriott Corp. v. N.L.R.B.*, 491 F.2d 367 (9th Cir. 1974), *cert. den.* 419 U.S. 881. In other Labor Law contexts, this Court has used of restatement to ascertain the federal law. *Scindia v. De Los Santos,* 451 U.S. 156, (1981) (Rejecting 9th Circuit's approach in Maritime Borrowing Statute use of Restatement).[6]

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[6] In *Rehmar v. Smith,* 555 F.2d 1362 (1976), the court declined to apply a rule of construction which provides for an interpretation against the draftsman. That case is *distinguishable,* and probably no longer represents the rule in this circuit. First, the court noted that it was unclear who drafted the provision under scrutiny, hence it was unclear who to construe against. This case represents construction in favor of public

Neither the trial court, nor the Ninth Circuit made any express findings regarding whether the CBA at issue as ambiguous, and if so, whether an objective approach to a construction of the CBA should be applied. Indeed, both courts rejected all of the evidence tendered Petitioner as not relevant or probative of any issue in dispute.

To that extent, both decisions appear to depart from the standards announced by this court, and therefore a review by this court to resolve this important issue would be appropriate.

B. THE LOWER COURTS' RULINGS CONFLICT WITH THIS COURT'S POSITION OF FAVORING A CONSTRUCTION OF COLLECTIVE BARGAINING AGREEMENTS TO PROTECT THE INTERESTS OF UNION MEMBERS.

There are rare cases involving a dispute between a Union member on the one hand, and the Union and Employer on the other hand in this court. Most of the cases appearing here have been between the Employer and the Union, the Employer and a Trustee of a Pension, or the Union and the Trustee, with this court always deciding that the public interest favored protection of the Union member who was not before the court to protect his own interest. *C.f., Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960); *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982); *Laborers Health And Welfare Trust Fund For Northern California v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539 (1988); *with Electrical Workers v. Heckler*, 481 U.S. 851 (1987) (Duties assumed under CBA; third party beneficiary;

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policy to protect employees, requiring a construction against **both** employer and union, hence who drafted what is not relevant. Second, the court adopted a rule utilizing state law for a construction of the CBA. This we now know is clearly contrary to U.S. Supreme Court precedent. *Walsh, supra* at 407-08; *Lingle*, at 407. Third, by *Scindia*, the 9th Circuit approach has been found wanting. Fourth, the 9th Circuit views has shifted. *Hayden v. Reickerd*, 957 F.2d 1506 (9th Cir. 1992).

no enforceable rights created); *United Steelworkers of America, AFL-CIO-CLC v. Rawson*, 495 U.S. 362, 375 (1990) (Construction of CBA; Scope of Arbitral issues; Preemption; contractual duty to inspect; third party claim not rejected).

In *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960) the Trustee of the Union welfare plan asserted a claim against the employer for unpaid royalties. Respondent employer defended on the ground that performance of its duty to pay royalties, as a third party beneficiary, was excused by the Union's violations of its duty under the CBA. The court reasoned "This collective bargaining agreement, however, is not a typical third-party beneficiary contract. The promisor's interest in the third party here goes far beyond the mere performance of its promise to that third party, i.e. beyond the payment of royalty. * * * * * unlike the usual third-party beneficiary contract, this is an industry-wide agreement involving many promisors . . . . . the burden will fall in the first instance upon the employees and their families across the country." *Lewis*, 361 U.S., at 468-69. In short, the court recognized the public policy of protecting Union members from overreaching by both the Employer and the Union.

Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982) is similar to *Lewis*, differing only in that the defense raised was that the payment on coal for which no payment had previously been made would violate the anti-trust provisions of Sherman Act. In this case, the court held that unlawful acts could not be compelled, and therefore the employer should be allowed, if it could, to prove that the payments were illegal.

Laborers Health And Welfare Trust Fund For Northern California v. Advanced Lightweight Concrete Co., Inc^., 484 U.S. 539 (1988), is similar to *Lewis* but differs from *Lewis* in that the Employer defended on the grounds that the post-contract payments were unenforceable. This court agreed that while the contract

payments were enforceable, the post-contract payments were not.

Electrical Workers v. Heckler, 481 U.S. 851 (1987) involved a suit by a Union member for damages suffered as a consequence of a breach of a duty of care by the Union to provide a safe work place, a duty the Union assumed under the CBA. The court acknowledged general rules of third party liability, but found "[t]he collective bargaining agreement between the Union and Florida Power, and ancillary agreements between those parties, contain provisions on safety and working requirements for electrical apprentices on which Heckler could try to base an argument that the Union assumed an implied duty of care. [Footnotes omitted.] In order to determine the Union's tort liability, however, a court would have to ascertain, first, whether the collective bargaining in fact placed an implied duty of care on the Union to ensure that Hechler was provided a safe workplace, and, second, the nature and scope of that duty, that is, whether, and to what extent, the Union's duty extended to the particular responsibilities alleged by respondent in her complaint. *Heckler*, 481 U.S., at 861-620. The court, in fact, strictly enforced third party beneficiary in the case, but came to the conclusion that Section 301 preempted the state tort claim.

United Steelworkers of America, AFL-CIO-CLC v. Rawson, 495 U.S. 362, 375 (1990) was an action by Minors' survivors of an industrial accident. claiming third party standing, the Survivors claimed a state-tort remedy based on a duty assumed by Union to inspect and maintain a safe work place. This court obsered that third party beneficiary is applicable to the CBA, but that the Survivors have no greater rights than the promissor or promisee and must be able to point to specific language in the CBA granting them a remedy. *United Steelworkers*, 495 U.S., at 375.

A general rule of construction, which implements

the foregoing rules, providing for one uniform national rule, favoring a construction which protects the public interest does exist. Restatement (2nd) Contracts provides, in relevant part:

> "§ 207. Interpretation Favoring Public.
>
> "In choosing among reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred."

The comment notes the distinction between public contracts and private contracts. In the former, where a public entity is a party, other rules apply. As an illustration, it uses the example of A employed by B as an inventor. A promises to B all rights, including improvements in the covered invention, in a pending application for a patent. Thereafter, A makes (another?) invention and applies for a patent. B claims it as an improvement. The public interest in encouraging invention supports an interpretation excluding future improvements unless future improvements were specifically included. The reporter cites 3 Corbin, Contracts § 550 (1962); 4 Williston, Contracts § 626 (3d ed. 1961).

In Labor Cases, the public policy is to protect the public, the employee from forfeitures, and to insure that neither the Union nor the Employer exempt themselves from liability for conduct contrary to public policy. *Marriott Corp. v. N.L.R.B.*, 491 F.2d 367 (9th Cir. 1974), *cert. den.* 419 U.S. 881; *Ingersoll-Rand Co. v. Perry McClendon,* 111 S.Ct. 478 (1990); *Nachman Corp. v. Pension Guarantee Corp.*, 446 U.S. 359, 374-75 (1979) (Avoidance of forfeitures); *N.L.R.B. v. Allis-Chambers Mfg. Co.*, 388 U.S. 175, 179-82 (1967), *rehrg den.* 389 U.S. 892 (1967); *Breininger v. Sheet Metal Workers*, 493 U.S. 67, 86-87 (1989); *Hayden v. Reickerd*, 957 F.2d 1506 (9th Cir. 1992). Accordingly, Restatement (2nd) Contracts § 207 is the preferred rule of construction. *E.g., Scindia v. De Los Santos*, 451

U.S. 156, (1981). Yet both court's rejected Petitioner's reasoning, and accepted a construction of the CBA which conformed to the Defendants' understanding of the CBA. The approach adopted by the lower courts vests unfettered discretion in the Employer and Union in derrogation of the public interest by allowing them to escape their responsibilities under Section 301.

As the court's appear to have departed from the principals enunciated by this court, review by this court at this time to resolve the issue is appropriate.

II.

THE COURT'S DEPARTED FROM SUMMARY JUDGMENT PROCEDURES WHICH THIS COURT, IN THE EXERCISE OF ITS SUPERVISORY POWERS, OUGHT TO CORRECT

On a motion for summary judgment, the court considers all discovery. F.R.Civ.P., R. 55(c). On a motion for summary judgment, the non-moving party bearing the burden of proof at trial must by affidavits, depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is a genuine issue for trial. Such evidence need not be admissible at trial to avoid summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1985). A *verified complaint* can be considered as equivalent to an affidavit in opposition to a motion for summary judgment to the extent that the complaint meets the requirements for affidavits set out in this rule pertaining to summary judgment. *Runnels v. Rosendale*, 499 F.2d 733 (9th Cir. 1974). While the court does not make findings of fact, it does make conclusions of law, and if the record as a whole demonstrates, without weighing the credibility of the witnesses, that the opposing party has available witnesses and evidence that demonstrates more than some metaphysical doubt as to the material facts, but evidence of a genuine triable issue of fact, then the motion must be

denied. *Bill Johnson Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 745, fn.11; *Matsushita Elec. Co., Ltd., v. Zenith Radio Corp*, 475 U.S. 574, 585-88 (1986); *Aronsen v. Crown Zellerback*, 662 F.2d 584 (9th Cir. 1982), *cert. den.* 459 U.S. 1200; *Hayden v. Reickerd*, 957 F.2d 1506, 1508 (9th Cir. 1992).

In this case, both court's rejected the deposition evidence, Plaintiffs' affidavit in the form of a verified complaint, fortified with exhibits showing qualifications and trips, and other affidavit evidence that Petitioner was being abused, and that the action taken was retaliatory. Indeed, the exhibits with respect to trips were conceded by the defendants below to be accurate. The dispute centered on how to characterize the trips, and how the trips were calculated.

The court rejected Plaintiff's evidence out of hand as not being probative of the issues, in a manner which appears to conflict with this court's standards of what a party in opposition to summary judgment must bear to meet his burden. Accordingly, supervisory review would be appropriate.

CONCLUSION

WHEREFORE, for all, or any one of, the foregoing reasons, this court should grant the writ of *certiorari* to the United States Court Of Appeals For The Ninth Circuit, and summarily reverse and remand, or set the matter for briefing and argument.

Dated: April 22, 1994

RESPECTFULLY SUBMITTED,

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ATTORNEY FOR PETITIONER

APPENDIX

MEMORANDUM, NINTH CIRCUIT COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GERALD J. SNYDER,

Plaintiff-Appellants,

v.

CONSOLIDATED FREIGHTWAYS, INC., et al,

Defendants-Appellants

FILED
Jan 28 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

No. 92-16960

D.C. No. CV-91-00834
Eastern District of California

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Edward J. Garcia, District Judge, Presiding

Submitted January 12, 1994**

Before: CHOY, SCHROEDER and NOONAN, Circuit Judges.

In January 1991, Appellee Consolidated Freightways, Inc. (Consolidated) fired Appellant Gerald J. Snyder (Snyder) as a supplemental driver employed under the terms of a National Master Freight Agreement (the NMFA), a multi-employer collective bargaining agreement negotiated by Snyder's union, Chauffeurs, Teamsters and Helpers Union, Local No. 150 (the Union). After successfully filing a grievance through the Union, Snyder sued Consolidated and Union for breach of contract and Union for breach of

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a), Ninth Circuit Rule 34-4.

duty of fair representation. Upon Consolidated's and the Union's submission of affidavits attesting to their compliance with the NMFA in terminating Snyder, the district court granted their motion for summary judgment against Snyder but denied their request for attorney's fees. We affirm.

Snyder contends that the NMFA's provisions for calculating tours of duty should be read liberally in light of the Restatement (2nd) Contracts, § 207 to protect third party beneficiaries such as himself. Section 207 provides that "[i]n choosing among reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred." A finding that Snyder had completed his 40 tours of duty and that his probationary period had thus elapsed before he received notice of termination, Snyder contends, would comport with the remedial, protective function of federal labor law.

As a preliminary matter, Snyder failed to establish sufficient ambiguity surrounding the technical terms entering into the calculation of tours of duty to justify application of Section 207 or reliance on other rules of construction.

Secondly, Snyder's self-serving conception of the public interest conflicts directly with an expressly stated and judicially recognized goal of Congress—promotion of uniform federal labor law encouraging unions and employers to contract for the final arbitral or judicial resolution of disputes. *See, Allis-Chambers Corp. v. Lueck*, 471 U.S. 202, 210 (1985). This goal would be illserved if each employee were vested with the authority to interpret the NMFA and compel arbitration on the basis of personal interpretation.

Finally, the Supreme Court has explicitly held that collective bargaining agreements are not typical third-party beneficiary contracts. *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 468 (1959). Therefore the rule of construction urged by Snyder is inapposite.

Snyder also contends that the trial court committed reversible error by finding that he had not raised a triable issue of material fact regarding the correct calculation of tours of duty under Article 58 of the NMFA. We review de novo a trial court's grant of a motion for summary judgment. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986). Viewing the record in the light most favorable to the non-moving party, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied the law. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986).

The dispute between Snyder and Appellees hinged on the terms "shuttle" and "turnaround" and their conversion into tours of duty. The Union and Consolidated presented the sworn affidavits of four officials with varied and considerable experience in the trade, including a union official, a firm representative and two truck drivers attesting to the correct method of calculating tours of duty under the NMFA. In addition, representatives of both Consolidated and the Union submitted affidavits declaring that Snyder had erroneously double counted shuttle runs within a single shift on four occasions prior to December 8, 1990, and twice thereafter.

Whereas the Appellees designated each of Snyder's hauls by type of dispatch and number of tours earned and corroborated these calculations in supporting affidavits, Snyder countered only with summary assertions about the number of tours of duty he earned on each dispatch without explaining his method for calculating tours or even designating tours by type of dispatch. A "party cannot manufacture a genuine issue of material fact merely by making assertions." *S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidd & Co.*, 690 F.2d 1235, 1238 (9th Cir. 1982).

In addition, Snyder presented no evidence to rebut the affiant's designation of the disputed hauls as shuttle dispatches and consequently differing calculation of the expiration date for Snyder's probationary

period. "Mere conclusionary allegations unsupported by factual data" cannot defeat a motion for summary judgment. *Angel v. Seattle-First Nat'l Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981). Having offered only conclusionary allegations as to the correct characterization of the four hauls in dispute, Snyder therefore failed to raise a triable issue of fact precluding summary judgment with regard to alleged breach of the notice of termination provisions in the NMFA.

Snyder's third contention as to the Union's breach of its duty of fair representation fails on a number of grounds. Firstly, Snyder fails to support the contention that the Union's conduct toward him was "arbitrary,, discriminatory or in bad faith" and thus in violation of its duty of fair representation under *Dudtrisac v. Catepillar Tractor Co.*, 749 F.2d 1270, 1272 (9th Cir. 1983), *quoting Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Balancing collective and individual interests in their decision whether to pursue an individual employee's grievance, unions retain wide discretion and substantial deference from the courts in suits alleging unfair representation. *Banks v. Bethlehem Steel Corp*, 870 F.2d 1438, 1441 (9th Cir. 1989); *Johnson v. United States Postal Service*, 756 F.2d 1461, 1465 (9th Cir. 1985).

Viewing the record in the light most favorable to the Union and according it due deference in handling employee grievances, the Union's representative, Christopher, made diligent efforts to represent Snyder before Consolidated, notwithstanding his carefully confirmed doubts about the merits of Snyder's grievance. Any untimeliness in filing of Snyder's grievance was occasioned by not by any arbitrary, discriminatory, or bad faith failure on Christopher's part, but by Snyder's failure to insist that a grievance be filed until the deadline had passed.

Even assuming *arguendo* that Christopher's conduct were negligent, a proposition Snyder did not support, mere negligent conduct on the Union's part would not constitute a breach of a duty of fair representation.

Clayton v. Republic Airlines, Inc., 716 F.2d 729, 732 (9th Cir. 1983). Provided that the Union's decision was in good faith and nondiscriminatory, its processing of Snyder's grievance need not be error-free. *Peterson v. Kennedy*, 771 F.2d 1244, 1254 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986). Viewed in the appropriate light, Christopher's recalculations of Snyder's tours of duty and Consolidated's notice of deadline gave Christopher a basis for refraining from filing a grievance (at least before Snyder demanded such action) that was not only nondiscriminatory and in good faith, but also correct.

Finally, even if Christopher's failure to file a timely grievance had violated the Union's duty of fair representation, such failure would not have prejudiced Christopher's [Sic. Probably should read Snyder's] rights. To prevail on a claim against a union for breach of its duty of representation, the plaintiff must prove that the duty was breached and that the underlying grievance would have been meritorious. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 165 (1983). Snyder did not even raise a triable issue of fact as to the merits of his grievance, much less furnish grounds from which a meritorious grievance could plausibly be ascertained.

Appellees counter that they are entitled to attorney's fees on appeal pursuant to 28 U.S.C., § 1967, Ninth Circuit Rule 28-2.3 and 39-1.6 and Ninth Circuit case law. *See e.g., Operating Engineers Pension Trust v. Cecil Backhoe Service, Inc.*, 795 F.2d 1501, 1508 (9th Cir. 1986) (awarding damages to appellee where appeal was frivolous). We deem an appeal frivolous "when the result is obvious or the appellant's arguments of error are wholly without merit." *McConnell v. Critchlow*, 661 F.2d 116, 118 (9th cir. 1981).

While this appeal might be seen as the last in a series of visceral reflex responses by Snyder to denial of an unfounded grievance, given the factual complexity of the tour tallying issue on which Snyder's various contentions ultimately hinged, the absence of a triable

issue of fact was not altogether obvious. Although the welter of evidence Snyder offered was upon closer analysis unresponsive to the issue of whether the disputed hauls were shuttle dispatches, in view of the complexity of the rules governing designation of the dispatches and tallying tours, we agree with the district court in declining to award Consolidated and Union attorney's fees.

AFFIRMED.

JUDGMENT, DISTRICT COURT, FILED 0/20/92

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

OFFICE OF THE CLERK
650 CAPITOL MALL
SACRAMENTO, CA 95814

GERALD J. SNYDER,

v.

JUDGMENT IN A CIVIL CASE

CIV S 91-834 EJG JFM

CONSOLIDATED FREIGHTWAYS, INC., et al,

JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has reached its verdict.

X DECISION BY COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision had been rendered

IT IS ORDERED AND ADJUDGED

THAT THE JUDGMENT IS HEREBY ENTERED ACCORDING TO THE COURT'S ORDER FILED 10/20/92.

ENTERED: October 20, 1992

Jack L. Wagner,
Clerk of the Court

By: _____
A. Bowser, Deputy Clerk

REPORTER'S TRANSCRIPTS, DISTRICT COURT, 10/16/92

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GERALD J. SNYDER, CIV S 91-834 EJG JFM

Plaintiff

v.

CONSOLIDATED FREIGHTWAYS, INC., et al,

REPORTER'S TRANSCRIPT OF PROCEEDINGS ON

DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, PLAINTIFF'S REQUEST FOR RULE 11 SANCTIONS, AND UNION DEFENDANT'S REQUEST FOR ATTORNEY'S FEES

Held in the United States District Court, Eastern District of California, Friday, October 16, 1992, Beginning at 9:00 a.m.

Before the Honorable EDWARD J. GARCIA, Judge thereof

Reported by: DeAnna M. Bates, CSR No. 8011

Appearances

For the Plaintiff	James Joseph Lynch, Jr. Attorney At Law * * * * *
Consolidated Freightways:	HARDY ERICH BROWN & WILSON Attorney at Law * * * * * BY: Glenda N. Reager Attorney At Law
Chauffeurs, Teamsters and Helpers, Local 150:	BEESON, TAYER, SILBERT, BODINE & LIVINGSTON * * * * * BY: Robert Bonsall Attorney At Law

SACRAMENTO, CALIFORNIA, FRIDAY, OCTOBER 16,

1992, 9:00 A.M.

——oOo——

THE COURT: The last case on calendar this morning is civil number 91-834, Gerald Snyder against Consolidated Freightways, et al, and Chauffeurs, Teamsters and Helpers, Local 150.

MS. REAGER: Good morning your Honor. Glenda Reager for Consolidated Freightways.

MR. LYNCH: James Joseph Lynch, Jr. for the Plaintiff in opposition.

MR. BONSALL: Good morning, Your Honor. Robert Bonsall for Defendant, Chauffeurs, Teamsters, and Helpers Local 150.

* * * * *

This matter is on calendar on both defendants' motions for summary judgment and also on Plaintiff's request for Rule 11 sanctions and on the union defendant's request for attorney's fees.

I reviewed the brief on the matter, and, in fact, we've done some independent research on the issues, and I'm prepared to rule.

Is there anything defendants wish to bring to my attention that they missed in their brief or which they wish to emphasize now?

MS. REAGER: No, Your Honor.

MR. BONSALL: No, Your Honor.

THE COURT: Mr. Lynch, anything further in opposition?

MR. LYNCH: Yes, Your Honor, there is. With respect to the Consolidated reply, I would move to strike the affidavits and exhibits. I don't know that they have any relevance. If they do have any relevance, their prejudicial effect it outweighed by their probative value.

THE COURT: You mean the four --

MR. LYNCH: Yes.

THE COURT: The two truck drivers and the union official and the employer official? Why do you believe that?

MR. LYNCH: And some transcripts they have included in here.

THE COURT: Why do you believe they are irrelevant?

MR. LYNCH: Well, for the same reasons that I felt that Archie Muriett's declaration is not relevant. It seems to me that the question of contract interpretation -- and I'm looking at Evidence Section 820 [Sic. Probably FRE 608(b).] --

THE COURT: Let me interrupt you. Your motion to strike is denied. Anything else, Mr. Lynch?

MR. LYNCH: I think it's a little unclear what I was saying in opposition. I want to make it real quick. There's a provision in the contract that I cite that says that short-line operations, shuttle operations, peddle operations, have a one-and-one-half-hour limitation for this type of operation. And a contract -- Article 58 cannot be read in isolation. Has to be read in the context of the contract. And because there is a contractual limitation on what the shuttle operations and peddle operations are, the contentions of the defendant that Mr. Snyder's trucking tours of duty are shuttle rather than turnaround dispatch just simply cannot be accepted.

I'll submit your honor.

THE COURT: Ms. Reager and Mr. Bonsall, if you submit the matter, I intend to grant your motions for summary judgment in their entirety.

MS. REAGER: I submit it, Your Honor.

MR. BONSALL: We submit it, Your Honor.

THE COURT: I'll take up the sanction motions later.

MR. LYNCH: Sanctions, Your Honor?

THE COURT: I said I'll take up the sanction motions later.

The reason I cut you off, Mr. Lynch, your arguments are irrelevant to the motions that are before me, and your brief was hard to understand because of that.

This is a hybrid 301 labor law action brought by plaintiff against his employer for breach of the collective bargaining agreement and against the union for breach of the duty of fair representation. Plaintiff, truck driver, alleges that the employer wrongfully terminated him in violation of the collective bargaining agreement and that the union breached its duty of fair representation by failing to pursue a grievance on his behalf.

For plaintiff to prevail in this hybrid action, he must show that the employer violated the collective bargaining agreement; that is, that plaintiff had a meritorious grievance and the union's conduct in handling of the grievance constituted a breach of the duty of fair representation under federal law.

Plaintiff contends that the union breached its duty of fair representation by failing to timely file a protest of his termination and by withdrawing the formal grievance it eventually filed without notice to him. These claims fail because of the great deference the Court must give a union's handling of those grievances. To breach the duty of fair representation, union's conduct in handling an employee's grievance must be shown to be arbitrary, discriminatory, or in bad faith. That's the holding of *Vaca against Sipes* cited by the defendants where the challenged conduct involves a union's judgment as to how to handle a grievance, the conduct is not deemed arbitrary. That's the teaching of *Peterson against Kennedy* cited by the defendants.

Defendant's have submitted the declaration of Ken

Christopher, the union's business representative whom plaintiff contacted after he was terminated. Christopher states that after listening to plaintiff's verbal complaint about his termination, Christopher explained that in his opinion plaintiff had been properly terminated in accordance with the agreement. However, Christopher told plaintiff he would look into the situation. Christopher states that at no time during this initial meeting did plaintiff request that the union file a protest of his termination.

In early February, plaintiff returned to Christopher's office and for the first time brought in his duty status form for Christopher to review. After reviewing the forms, Christopher told plaintiff he incorrectly calculated his tours of duty. Plaintiff disagreed and requested that the union file a formal grievance. Christopher advised plaintiff the grievance would not succeed, but at plaintiff's insistence, he filed it anyway on February 5 of 1991. The grievance was denied immediately as untimely and also on the merits. Thus, Christopher withdrew the grievance on the grounds it lacked merit.

Plaintiff offers no evidence whatsoever to refute Christopher's affidavit. The collective bargaining agreement requires that a written protest be filed within ten days of the termination. The evidence shows that plaintiff made no request that a protest be filed within ten days of the termination. The evidence shows plaintiff made no request that a protest be filed until the second meeting on February 5, well beyond the ten-day limit for filing the protest. Plaintiff has offered no evidence to refute this. I also note that the portion of plaintiff's deposition that is submitted shows that plaintiff as a former assistant steward completely understood the two-step process for filing protests and grievances, including the ten-day limit. In any event, it's clear that the conduct at issue in this case with respect to the handling of the grievance required the exercise of judgment on the part of the union officials. As such, it cannot be said to be arbi-

trary. That's what *Peterson* and *Kennedy* teach. Nor has plaintiff presented any evidence to demonstrate that the union's conduct was in bad faith or discriminatory. Accordingly, defendants' motion for summary judgment as to the breach of fair representation must be granted.

As to the breach of the collective bargaining agreement, it provided that a supplemental driver, such as plaintiff, become eligible for permanent employment after he performed forty tours of duty within a consecutive four-months period. The employer has thirty days within which to determine that the employee met the employer's standards and place him on the preferential hire list, or to determine that he didn't and to terminate him. During this probationary period, the employee may be terminated at will without cause.

The dispute turns on the computation of the date on which plaintiff completed the required forty tours of duty. Plaintiff alleges in the complaint and argues in his brief that he completed forty tours on December 5, 1990, and thus defendant employer had until January 5, 1991 to make the determination and give him notice of termination. Since termination notice was not given until January 8, Plaintiff claims he became a seniority line driver who could only be terminated for cause.

Defendants submit evidence that plaintiff has erroneously interpreted the collective bargaining agreement's definitions of what constitutes a completed tour of duty and therefore has incorrectly computed the date on which he actually completed forty tours. Defendants claim that that date was December 28, 1990, and thus the termination notice on January 8 was well within the thirty-day period allowed under the collective bargaining agreement. The collective bargaining sets forth what constitutes a tour of duty however, the terminology is not defined. Defendants submit evidence by way of declarations as to the correct interpretation of the terms in the col-

lective bargaining agreement.

Plaintiff has failed to come forward with any evidence to show either that defendants' interpretation of the collective bargaining agreement is wrong or that their method of calculating tours of duty is unreasonable. In addition, plaintiff has not explained his method for calculating tours nor submitted any evidence that his method is superior to that of the defendants, nor has he submitted any evidence to counter four declarations submitted by the defendants of a union official and employer official and two fellow truck drivers, all of whom are familiar with the methodology of computing tours of duty under their collective bargaining agreement.

For those reasons, both defendants' Motions for Summary Judgment are now granted and plaintiff's request for Rule 11 sanctions is denied.

Union defendants also move for attorney's fees, citing a case that the Court is familiar with, it having been decided here. Having revisited this case, I don't think that their action was brought in bad faith, at least not in connection with my holding of the B.Y. Heating and Air Conditioning case. so that I'm not inclined to vary the American rule that each side bear its own costs and fees.

Do you wish to be heard further on the request for fees, Mr. Bonsall?

MR. BONSALL: No, Your Honor.

THE COURT: That request is denied.

MR. LYNCH: I have one matter, Your Honor, if I may bring to the court's attention at this time. My Exhibit 2 sets out the method Mr. Snyder calculated his tours. That was submitted. That is an excerpt from the complaint. The complaint was verified, and as I pointed out in my points and authorities, when a complaint is verified to the extent that it states facts under penalty of perjury, that constitutes an affidavit.

THE COURT: All right. I'll prepare a summary order of decision on the matter. Thank you, counsel.

MS. REAGER: Thank you, Your Honor.

MR. LYNCH: Thank you, Your Honor.

MR. BONSALL: Thank you, Your Honor.

(Whereupon the proceedings were concluded.)

——oOo——

EXCERPTS FROM COLLECTIVE BARGAINING AGREEMENT

Article 45. Grievance Procedure

Section 1.

"General

"The Union and the Employer and/or Employer Association agree that there shall be no strike, lockout, tie-up or legal proceedings without first using all possible means of settlement as provided for in this Supplemental Agreement and in the National Agreement, if applicable, of any controversy which may arise. All disputes shall first be taken up between the Employer and Local Union involved. Failing adjustment by these parties, the following procedures apply:

"(a) The dispute then may be filed by either party with an appropriate Joint State Committee. A majority vote of a Joint State Committee shall be final and binding upon the parties to the dispute and the employee(s) involved and no appeal may be taken to the Joint Western Area Conference.

"*****

"Time Limitation

"(h) All grievances, claims and disputes shall be submitted to the Joint State Committee within forty-five (45) days of the occurrence of the matter upon which the grievance, claim or dispute is based. Any such grievance, claim or dispute not submitted within such time shall be waived unless the Joint State Committee by majority vote for good cause accepts such submission, or unless either party has intentionally concealed the facts upon which the grievance claim (sic) or claim is based.

"'******"

Article 46. General Discharge Or Suspension

Section 1.

"Cause for Discharge or Suspension

"******"

Section 3.

"Protest Procedure

"(a) Warning notices must be made in writing to the Employer within ten (10) days exclusive of Saturday, Sunday and holidays. If the matter is not resolved to the satisfaction of the parties, either party may file the case with the Joint State Committee as provided in Article 45, Section 1, of this Supplemental Agreement

"******

"(b) Protests to suspension or discharge must be made in writing to the Employer within ten (10) days exclusive of Saturday, Sunday and holidays. If the matter is not resolved to the satisfaction of the parties, either party may file the case with the Joint State Committee as provided in Article 45, Section 1, of this Supplemental Agreement.

"******"

Article 58.

Section 1. Supplemental Line Drivers

"(a) When an Employer utilizes any non-seniority supplemental driver(s) or non-seniority owner-driver(s) thirty (30) or more tours of duty in any three (3) consecutive months, such Employer may be required to add one (1) additional driver to the line seniority roster. Each driver, so added, shall be subject to the

probationary period, and such period to begin with the first trip he pulls after being added to the line board. Such supplemental line drivers, so utilized, shall be given consideration when adding additional probationary employees.

"(b) An employer and the Local Union involved may agree upon circumstances when tours of duty worked by supplemental line drivers or non-seniority owner-drivers used as bona fide replacements for regular drivers who are unavailable for work shall not be counted in calculating the thirty (30) tours of duty in three consecutive months referred to in subsection (a) above.

"(c) When a supplemental driver has been utilized by one Employer for forty (40) tours of duty within four (4) consecutive months, the Employer must start personnel processing immediately. The Employer will have thirty (30) calendar days to perform the personnel processing. The driver and the Local Union shall then be notified whether or not the driver meets the Employer's Standards. If the driver does not meet the Employer's standards he will not be used further. Automatic processing may be waived with a written agreement between the individual, the Local Union and the Employer. If the supplemental driver does meet the Employer's standards, he shall be placed on a preferential hire list on the date such driver pulled the forty first (41st) tour. When the Employer hires additional drivers, such drivers shall be hired from the preferential hire list in accordance with his ranking on such list. His seniority date shall be the date he pulls the first trip as a regular employee. Failure of the Employer to add from the preferential hiring list in this order shall subject the Employer to runaround claims. Drivers who are hired off

the preferential hire list shall not be subject to any further probationary period. In addition, drivers on the preferential hire list shall be offered supplemental line trips in accordance with their ranking on the preferential hire list. The Employer shall not be obligated to make more than one (1) call per supplemental line driver per day. Such call need not be verified, however abuse of this procedure and/or disciplinary (sic) action shall be subject to the grievance procedure.

"Supplemental drivers who are placed on the preferential hiring list and who meet the Employer's hiring standards and qualifications for regular employment shall have regular monthly health and welfare contributions paid by the Employer on their behalf as set forth in Article 52, section 1, Health and Welfare, the month following the monthly such supplemental driver first becomes eligible for regular employment. Such contributions shall continue to be paid by the Employer each month thereafter provided the preferential supplemental driver satisfies the forty (40) hour eligibility requirement provided in Article 52. Preferential supplemental drivers who qualify for regular health and welfare contributions shall also be eligible for regular health and welfare benefits each month a regular contribution is paid by the Employer on their behalf.

"NOTE: For the purposes of this section, a tour of duty is defined as follows:

"One (1) tour for each leg of a layover dispatch;

"One (1) tour for each turnaround dispatch;

"Two (2) tours for each full day on a sleeper cab operation dispatch."

"(d) *****"

Article 60. MEAL PERIOD

"Drivers shall, except by mutual agreement, be allowed one (1) continuous hour for meals, but in no event less than thirty (30) minutes, nor more than one (1) hour in each ten (10) hour period. No driver shall be compelled to take more than one (1) continuous hour during such period nor compelled to take any part of such continuous hour before he has been on duty four (4) hours or after he has been on duty six (6) hours. Meal periods shall not be compulsory at terminals where driver is responsible for equipment or cargo, nor shall meal period be compulsory when or where there is no accessible eating place.

"*****"

Article 62. GENERAL PROVISIONS

"*****

Section 2.

"(a) Any Employee called and reporting for duty, and for whom work is provided in over-the-road operations, shall be guaranteed a minimum of eight (8) hours pay at the applicable hourly rate.

"(b) When an employee is called and reports for duty and no work is provided, he shall be guaranteed a minimum of six (6) hours pay. ....

"*****"

Article 65. PICK-UP AND DELIVERY LIMITATIONS

"(a) Line operations shall be dock to dock, however, in addition to company terminals, one pickup may be made at point of origin, or one delivery may be made at destination, provided the driver receives the applicable hourly rate in

the Agreement for such service, including time lost through such pickup and/or delivery; time elapsed during such pickup shall be restricted to a maximum of one and one-half hours (1-1/2) hours.

"(b) Line drivers may be required to drop and/or pick trailers at points en route and at intermediate terminals.

"Line drivers may be required to hostle their own equipment where there is no bid hostler on duty at the terminal. All double units will be prestrung by local Cartage employees, if the equipment is available, when the terminal is open. Abuse of this provision will be subject to the grievance procedure.

"Short Line or Peddle Operations

"(e) A short line or peddle operation is the operation of a driver making a round trip which extends beyond the territorial coverage of a local wage agreement, and which does not require the driver to lay over for a rest period during such round trip, provided however, that any such round trip constituting a part of a division of a longer operation in which there is a continuous through movement of equipment and lading with changes of drivers at established division points, shall not be considered a short line operation. Shortline operations shall include loading and unloading freight.

"A short line driver or peddle run driver may be permitted at a point of destination or point of origin, but not both, during his tour of duty, to pick up a continuing through run, but in no event shall a line driver who has hours to work have his dispatch interrupted to have the short line or peddle driver complete his run.

"Short line operations where confined to terminal on a closed door basis shall be paid for as prescribed in Article 66, Section 4 and Appendix "A" of the Western States Area Over-the-Road Agreement.

"Turnaround operations as described in Article 66, Section 5 of the Western States Area Over-the-Road Agreement shall be paid in accordance with the provisions as contained therein.

"Shuttle

"Shuttle work between satellites and break bulk terminals may be performed by short-line drivers or local drivers based on the company's operating requirements, unless mutually agreed otherwise or as established by past practice. This method of operations shall be set forth in the Change of Operations as approved by the Committee; however, such approved method of operations shall not conflict with any Joint Council jurisdiction award.

"******"

Article 66. SINGLE MAN OPERATIONS

*****

Section 4.

"Short Line Hourly Rates.

"(a) Drivers in short line and peddle operations shall be paid for all time spent from the time driver reports for work until he is effectively released at the end of his tour of duty, exclusive of time taken for meals. The applicable rates of hourly pay ....

"(b) ....

Section 5.

"Turnaround Operations.

"Turnaround or double-turnaround operations shall be made at a regular designated point or as designated on the dispatch orders. Drivers shall be paid miles (or hours, which ever is greater) with a minimum of eight (8) hours for each tour of duty except as permitted in Article 65, section (e) of this Supplemental Agreement. However, all drivers on the seniority roster at the signing of this Agreement shall be paid as in the past.

"Drivers shall not be released from duty at such turnaround point, except under the provisions of Article 60. Time spent in the service of the employer, other than driving time, shall be paid at the regular applicable hourly rate in this Agreement.

****

Section 7.

"Layover Pay

"(a) The layover provision may apply twice during any one (1) round trip. In the event a driver is required to take a rest period(s) during any one round trip, away from his home terminal, he shall be compensated for layover time as follows: For the first fourteen (14) hours of each layover, period after the run ends — no pay. For the next eight (8) hours, beginning with start of the fifteenth (15th) hour after arrival at the layover point, at the regular hourly rate of pay.

For the next ten (10) hours — no pay. For the next eight (8) hours at the applicable regular hourly rate of pay, and continuing on the same basis for each eighteen (18) hours of continuing layover."

ARTICLE 67. SLEEPER CAB OPERATIONS

Section 1.

"Limitation, Protection of Single Man Runs

"(a) Sleeper Cab Operations shall be between designated terminals with a designated home terminal. An Employer shall not operate sleeper cabs over the same route where he has established relay runs or through runs, except to move an unusual overflow of freight and in such event drivers employed on relay runs or through runs shall have full guaranteed preference unless otherwise agreed to, and sleeper cab drivers shall be compensated either by the mileage rate or hourly rate for all time spent on such relay route.

"An Employer shall not distribute freight on a multi-trailer basis on any sleeper cab dispatched to avoid the operation of through or turnaround runs or short line or peddle runs. There shall be no deliberate runaround payment as a subterfuge for running around leg, relay or through runs.

Mileage Restriction

"(b) There shall be no two (2) man operation on runs of less than five hundred (500) outbound miles with a thousand (1000) mile round trip, unless otherwise previously agreed to, or agreed to in the future. Within the five hundred (500) mile limitation the drivers will be permitted to drop or pick trailers, provided the route is not a circuitous route.

"Definition

"(c) A Sleeper Cab trip is exactly as is defined in Section 1 (a) and (b) of this Article During such sleeper cab trip t here may be a pick-up or drop of freight as permitted under this Supplemental Agreement."

EXCERPT, VERIFIED COMPLAINT

5.6. For the four month consecutive period of September 1 to December 31, 1990, SNYDER pulled fifty one tours of duty as follows:

Tour #	Date	Tour[1]	Exhibit #
1	09/01/90	R.L., Pleasanton, Bresbane, R.L.	17
2	09/01/90	R.L., Santa Rosa, Sacramento	17/18
3	09/20/90	R.L., Vallejo, Sunnyvale, Stockton, Sacramento	20
4	09/21/90	R.L., Oakland, R.L.	21
5	09/22/90	R.L., Corning, Medford	22
6	09/23/90	Roseburg, Willows, R.L.	23
7	09/24/90	R.L., Richmond	24
8	09/28/90	R.L., Richmond, San Jose	26
9	09/29/90	R.L., Brisbane, R.L.	27
10	09/29/90	R.L., Pollock	27
11	09/30/90	Ashland, Roseburg, Redding, R.L.	28
12	10/05/90	R.L., Vallejo, R.L.	30
13	10/06/90	R.L., Brisbane, R.L.	30/31
14	10/19/90	R.L., Oakland, R.L.	33
15	10/22/90	R.L., Vallejo, R.L.	35
16	10/29/90	R.L., Pollack, Talant, Roseburg	37
17	10/30/90	Roseburg, Talant, Morebrook, Willows, R.L.	38
18	10/31/90	R.L., Talant, Roseburg	39

[1] R.L.= Rio Linda, home dispatch. Ashland, Medford, Roseburg and Talant Wolf Crk are all in Oregon. Pollack = Pollack Pines, CA.

19	11/01/90	Roseburg, Medford, R.L.	40
20	11/02/90	R.L., Willows, Roseburg	41
21	11/03/90	R.L., Roseburg, Pollack P., R.L.	42
22	11/04/90	R.L., San Francisco, R.L.	42/43
23	11/04/90	R.L., Stockton, R.L.	43
24	11/05/90	R.L., Morgan Hill, Pleasanton, Tracy, R.L.	44
25	11/06/90	R.L., Chowvilla, Turlock, R.L.	45
26	11/16/90	R.L., Santa Rosa, R.L.	47/48
27	11/17/90	R.L., Medford	48
28	11/18/90	Medford, Roseburg, Pollack, R.L.	49
29	11/19/90	R.L., Sunnyvale, Livermore, R.L.	50
30	11/25/90	R.L., Pollack, Ashland, Roseburg	52
31	11/26/90	Roseburg, Wolf Crk, Ashland, R.L.	52/53
33[2]	11/30/90	R.L., Corning, Ashland, Cayonville, Eugene, Portland	55
35[3]	12/01/90	[Portland] Seattle, Mile 47, Ellensburg, Pendleton, Baker, Boise	56
37[4]	12/02/90	Boise, Snowville, South Lake, Elko, Lovelock, R.L.	57
38	12/03/90	R.L., Pollock, Roseburg	58
39	12/04/90	Roseburg, Pollack, R.L.	59
40	12/05/90	R.L., Sunnyvale, R.L.	60/61
41	12/06/90	R.L., Richmond, R.L.	61/62

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[2] Sleeper Operation with Gale Nelson
[3] Sleeper Operation with Gale Nelson
[4] Sleeper Operation with Gale Nelson

42	12/07/90	R.L., Vallejo, R.L.	62
43	12/07/90	R.L., Hayward, R.L.	62/63
44	12/14/90	R.L., Fresno, Turlock, R.L.	65/66
45	12/21/90	R.L., Hayward, R.L.	68/69
46	12/27/90	R.L., Vallejo, Hayward, Tracy, R.L.	72
47	12/28/90	R.L., Richmond, R.L.	73
48	12/30/90	R.L., Newark, Tracy, R.L.	75
49	12/30/90	R.L., Stockton, R.L.	75
50	12/31/90	R.L., Vallejo, R.L.	76
51	12/31/90	R.L., Oakland, Dixon, R.L.	76

5.7. On December 5, 1990, SNYDER pulled his fortieth (40th) tour of duty.

5.8. The thirtieth (30th) day following SNYDER's the fortieth (40th) tour was January 4, 1991 and during the 30 day period following his 40th tour, SNYDER completed an additional 11 tours.

5.9. On January 8, 1991 EMPLOYER gave notice of termination for failure to meet standards, terminated SNYDER, and paid SNYDER his last check.

5.10. By virtue of the EMPLOYER's failure to give notice within 30 days after the fortieth (40th) tour, and SNYDER having pulled a forty-first (41st) tour, SNYDER became a seniority line driver who could only be terminated for cause.

5.11. SNYDER promptly went to LOCAL 150 and **demanded a grievance on the grounds** that the EMPLOYER had breached the collective bargaining agreement, and on January 9, 1991, LOCAL 150 contacted EMPLOYER to determine the cause of discharge.

5.12. **SNYDER informed and believed by representations of Union that the January 9, 1991 constituted the filing of a grievance.** (Exhibit 81.)

5.13. In Early February 1991, SNYDER provided LOCAL 150 with his trip tickets demonstrating his tours of duty, and Union filed a grievance. Exhibit 81.

5.14. Sometime in February 1991, LOCAL 150, without notice to, or consultation with, SNYDER, and contrary to the best interest of SNYDER and without his consent, express or implied, withdrew the grievance claim of SNYDER based on the EMPLOYER's response. Exhibit 81.

[Emphasis added. Note: Exhibits refer to the driver's logs; the original of the logs were turned in to the employer; copy retained by driver.]

*****

VERIFICATION

I am the Plaintiff in this action; I have read the foregoing Complaint; the foregoing Complaint is true and correct of my own knowledge, except as to those matters alleged on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury under the Laws of the United States that the foregoing is true and correct and that this declaration was executed on April 22, 1994.

/s/_____
GERALD J. SNYDER,
PLAINTIFF

CHRISTOPHER LETTER OF MARCH 14, 1991, EXCERPT OF RECORD, NINTH CIRCUIT, PAGE 223A, 223B (COMPLAINT EXHIBIT 81).

CHAUFFEURS, TEAMSTERS, AND HELPERS
LOCAL NO. 150

1120 EAST PARKWAY SACRAMENTO CALIFORNIA 95823
TELEPHONE (916) 392-7070 FAX 392-7675

March 14, 1991

James Joseph Lynch, Jr.
Attorney At Law
P.O. Box 15766
Sacramento, CA 95852-0766

Re: Gerald Snyder

Dear Mr. Lynch:

This letter is in response to your correspondence dated February 27, 1991, regarding the above-referenced individual. The following is a summary of my involvement with the grievance and the Union's position regarding Mr. Snyder's claim under the collective bargaining agreement.

Gerald Snyder, a member of Teamsters Local Union No. 150, I.B.T., first contacted me sometime in early January, 1991, and stated to me that his employer, Consolidated Freightways, had informed him that he did not meet the company's standards and a formal letter of termination would follow. On January 9, 1991, I contacted Mr. Dave Mann, the Dispatch Operations Manager at Consolidated Freightways, and inquired as to exactly why Mr. Snyder was being terminated. I was told that Mr. Snyder did not meet the Company's standards and if I had any further questions to contact a Mr. Bertoch in Los Angeles, whom I believe is the Director of Personnel for Consolidated Freightways.

I then contacted Mr. Bertoch's office and had a brief conversation with Mr. Bertoch's secretary. I was

informed by this secretary that they had no way of knowing anything about Mr. Snyder's situation and they would have a Mr. Ray Alvarez, the Southern California Labor Relations Representative contact me.

In early February, 1991, Mr. Snyder came to me with his log books stating that he had actually completed forty (40) tours of duty in a one hundred twenty (120) day period. This was the criteria for hiring under Article 58(c) of the 1985-1988 National Master Freight and Western States Area Supplemental Agreements between Union and Company. I filed a grievance and presented the matter to Consolidated Freightways representatives. However, the Company immediately pointed out the change under Article 58(c) under the 1988-91 National Master Freight Agreement which required forty (40) tours of duty within four (4) consecutive calendar months. As of the month of December 1990 when Mr. Snyder was informed that he failed to meet the Employer's standards, he had not worked forty (40) tours during the four (4) consecutive months of September through December. Therefore, I had no alternative but to withdraw the grievance for lack of merit.

In the mid-part of February, 1991, at the J.W.A.C. hearings at San Diego, I had a conversation with Mr. Alvarez. I asked him why the Company had terminated Mr. Snyder, and he stated that even though Mr. Snyder might have been a good employee, the Company believed they had other casual employees they considered superior in work performance to Mr. Snyder. I have had no further involvement with the grievance.

You also inquired whether I could verify Mr. Snyder's position as former steward of the Local and whether or not other former stewards have experienced the same or similar treatment by Consolidated Freightways. While I have no personal knowledge of Mr. Snyder's capacity as a former steward, it is my information and belief that he has served as a steward. Finally, I know of one former steward, Ray Rasmussen,

who was released by Consolidated Freightways prior to attaining the requisite number of tours. To my knowledge, Mr. Rasmussen did not file a grievance or unfair labor practice charge due to a lack of evidence that his release from Consolidated Freightways was related to his status as a former steward.

I trust that this answers all your questions. If I can be of any further assistance to you or Mr. Snyder, please do not hesitate to call.

SINCERELY,

CLIFF WEBB
SECRETARY-TREASURER

BY: _____
KEN CHRISTOPHER
BUSINESS REPRESENTATIVE

EXCERPT OF NINTH CIRCUIT RECORD, P. 91, DECLARATION OF KEN CHRISTOPHER, FILED 7/24/92.

I, Ken Christopher, am a business representative of Chauffeurs, Teamsters, and Helpers Local No. 150 (hereafter "Union" or "Local 150"). I am responsible for administering the collective bargaining agreement with the Union and Consolidated Freightways Corporation (hereinafter, "Employer" or "CF"). I have personal knowledge of the facts and circumstances set forth in this declaration and, if called testify, I would so state.

1. I have been a member of the International Brotherhood of Teamsters since 1964 working primarily in the freight industry under the terms of the National Master Freight Agreement and Western States Area Supplemental Agreement (hereinafter, "NMFA"), a multi-employer collective bargaining agreement negotiated by the International Brotherhood of Teamsters. From 1964 to 1968, I was employed as a delivery driver for Virgin Truck Lines in Antioch, California. From 1968 to 1973, I was employed as a delivery driver for Transon Lines located in San Leandro, California. From 1973 to December 30, 19990, I was em-

ployed as an over-the-road ("OTR") Line Driver for Consolidated Freightways in Hayward and Sacramento, California. On January 1, 1991, I began my elected term as a business representative of Teamsters Local 150, representing Union members employed in the trucking or freight industry.

2. Beginning in 1978, I served as the Chief Shop Steward for the Union at the Consolidated Freightways' facility in Sacramento. During my tenure as Chief Steward, I literally handled hundreds of grievances arising under the collective bargaining agreement between the parties, including disputes arising under Article 58 of the NMFA regarding the hiring procedures of supplemental line drivers. A true and correct copy of Article 58 is attached as Exhibit "A" to the statement of Uncontroverted Facts and Conclusion of Law (hereinafter, "Statement of Uncontroverted Facts.")

3. Pursuant to Article 58, a driver for Consolidated Freightways begins as a non-seniority supplemental driver. To become a regular full-time driver. the supplemental driver must be utilized by the Employer for forty (40) tours of duty within four (4) consecutive calendar months. At that time, the Company must begin personnel processing for that driver which must be completed within thirty (30) days. By the well established practice of the parties, the processing period is construed as a probationary period during which the Employer has sole discretion and final authority to release the driver for failure to meet Company standards. If the driver successfully passes the probationary period, he or she is placed on a preferential hire list. Drivers on the preferential hire list are hired in accordance with his or her ranking on the list at which time the driver become a regular employee.

4. Gerald Snyder, a member of Teamsters Local 150, first contacted me and Chris Folkman, another Business Agent of the Union, in early January, 1991. Snyder said that Consolidated Freightways had informed him that he was terminated as a supplemental

driver because he did not meet the Employer's hiring standards. During our discussion, Snyder claimed that he began working for CF in mid-August of 1990 and had completed forty tours by early December 1990. He further claimed that he had completed his thirty day probation shortly before he was terminated by Consolidated Freightways. Chris Folkman and I explained to Snyder that the labor agreement required completion of forty tours within four calendar months. Thus all tours of duty performed by Snyder in August 1990 would not count unless he completed his fortieth tour by November 30, 1990. However, Snyder claimed he was terminated unfairly and that the Company lacked good reason to release him. I explained to Snyder that under the terms of the labor agreement CF could terminate a driver during his probationray period for any reason, with or without cause, and the Union would be unable to successfully challenge such a termination under the grievance procedure. Nevertheless, **I promised Snyder I would contact the Company to request a further explanation as to why Snyder was released from employment.** Snyder seemed satisfied with my proposal. At no time did Snyder request that I file a grievance on his behalf, nor did I expressly state or imply that I would file a grievance on his behalf.

5. On January 9, 1991, I asked Mr. Dave Mann, the Dispatch Operations Manager of Consolidated Freightways, about Snyder's termination. Mann simply said that Mr. Snyder did not meet the Company's standards and that I should direct further questions to Richard Bertoch, Western Area Personnel and Safety Director of Consolidated Freightways, in Los Angeles.

6. On or about January 10, 1991, I called Bertoch regarding Snyder's termination. I spoke briefly with Mr. Bertoch's secretary who said that she would have Ray Alvarez, the Southern California Labor Relations Representative call me.

7. On or about January 17, 1991, Alvarez called. Alvarez said that he had no answer to my questions

about the termination, but that he would personally contact Mann and get back to me.

8. In early February, 1991, Mr. Snyder came to me with his driver's record of duty status forms which he had prepared while at CF. Each driver of CF must maintain,, on an ongoing basis, such duty status forms. The purpose of these forms is to record both on and off duty status of the driver to assure compliance with the United States Department of Transportation Federal Motor Carrier Act, Hours of Service Regulations, 49 CFR § 392, *et seq.* Attached to this declaration are all driver's record of duty status forms prepared by Gerald Snyder during his employment with CF from August 13 to December 31, 1990. These records were marked as Exhibits 12 through 76 in Snyder's original complaint and are set forth in toto as Exhibit "B" to the Statement of Uncontroverted Facts. Snyder stated that he had in fact completed 40 tours of duty in a 120-day period and had served his 30 day processing period before being terminated. I advised Snyder that he was using old hiring criteria under the 1985-1988 National Master Freight Agreement and that under the current Agreement (1988-1991), an individual must have completed forty (40) tours of duty in a consecutive four-month period pursuant to Article 58, Section 1(c). I told Snyder that he had to calculate his tours in a consecutive four-month period. We reviewed each of Snyder's record of duty status forms and tallied up the total number of tours of duty he had completed. I have prepare (sic) a summary of Snyder's driver's record of duty status forms. This summary is attached as Exhibit "C" to the statement of Uncontroverted Facts. I noted that Snyder was erroneously interpreting a number of the records by equating several of his "shuttle" dispatches as "turnaround" dispatches and, thus, crediting himself with multiple tours of duty. Specifically, I informed Snyder that he had completed only one tour of duty for each of the multiple shuttle dispatches which began on the following dates:

- September 1 and 28, 1990;
- October 5, 1990;
- November 3, 1990;
- December 6, 30, and 31, 1990;

Snyder disagreed with my interpretation of the labor agreement and the calculation or (sic) his tours of duty for CF. I told Snyder that, based on my know-ledge and experience under the NMFA, he had not completed 40 tours in a consecutive four-month per-iod and his 30 day processing period when the Emplo-yer informed him of his termination in January, 1991.

9. Snyder insisted on filing a grievance. I advised Snyder that the Union would have no success whatsoever simply because the Company had not violated the labor agreement. I also informed Snyder that a grievance would not be successful because a grievance at that late date would be untimely under Section 46 under NMFA. Section 3(b) of Article 46 states that a grievance protesting a suspension must be filed in writing within ten (10) days, exclusion of Saturdays, Sundays, and holidays, of the alleged violative conduct. Thus, Snyder's right to file a grievance regarding his termination expired on January 22, 1991. However, due to Snyder's insistence and against my best wishes, I filed a grievance on February 5, 1991. Subsequently, a grievance meeting ensued attended by Barry Banks (Terminal Manager), Dave Mann (Dispatch Operations Manager), and Ed Fitzgerald (Assistant Terminal Manager). Banks denied the grievance immediately upon its presentation non the ground that it was untimely and that the Employer had to violated the Agreement. At that point, I had no choice but to withdraw the grievance for lack of merit.

10. On February 6, 1991, Snyder visited my office. I explained to him the basis for the Employer's denial of the grievance. I told him that I would talk to Alvarez on his behalf at the forthcoming Joint Western Area Committee hearing in San Diego. Snyder thanked

me and departed. Christopher Folkman was present during this conversation.

11. On February 12, 1991, I spoke with Alvarez in San Diego about Snyder's termination. Alvarez said that he had talked to Mann and that Snyder was terminated for failing to meet the Employer's hiring standards in accord with the agreement. Since then, I have had no further involvement with the grievance.

I declare under penalty of perjury under the Laws of the State of California that the foregoing is true and correct and that this declaration is executed this 21 day of July, 1992, in Sacramento, California.

/s/ KEN CHRISTOPHER
KEN CHRISTOPHER

DEPOSITION OF SNYDER, EXCERPT OF RECORD, NINTH CIRCUIT, PAGES 81, 82, 170-177 [RT -77-, -90-, ETC.]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GERALD J. SNYDER, No. CV-S-91-834-EJG-JFM

Plaintiff

v.

CONSOLIDATED FREIGHTWAYS, INC., et al,

DEPOSITION OF
GERALD J. SNYDER

June 8, 1992

Taken before KIMBERLY J. YOUNG
Certified Shorthand Reporter
CSR License # 8696

Appearances

For the Plaintiff	James Joseph Lynch, Jr. Attorney At Law
	* * * * *
Consolidated Freightways:	HARDY ERICH BROWN & WILSON Attorney at Law
	* * * * *
	BY: Glenda N. Reager Attorney At Law
Chauffeurs, Teamsters and Helpers, Local 150:	BEESON, TAYER, SILBERT, BODINE & LIVINGSTON
	* * * * *
	BY: Robert Bonsall Attorney At Law
Also Present	Chris Folkman

——oOo——

* * * * *

MR. BONSALL: Okay. I may have asked you this

question, and I don't mean to repeat it, but did you ever become a shop steward with System 99?

A: No.

Q: Outside of this one grievance you referred to, I think that you said that you were not involved in any other grievance at System 99, correct?

A: Not to my knowledge, no.

Q: Okay. Your next employer after System 99 was Transcon Lines, correct?

A: Correct.

Q: . . . . . Were you ever a shop steward at Transcon Lines?

A: Yes, I was. Let me rephrase that, if I may. Assistant shop steward.

Q: And how did you become an assistant shop steward?

A: I was asked by some of the drivers over there to perform those duties.

Q: Were you elected?

A: As a matter of fact, I was elected. We had an election. The union steward stepped down . . . . .

[-77-]

* * * * *

little more work. Fine. Let's go talk to the union steward. He takes it from there. I personally was not involved in filling out or signing any such complaints.

Q: On behalf of --

A: Right. I -- I verbally helped, but as far as signing, that is up to the individual.

Q: Okay. So when you say that you were verbally involved, you mean you would take -- you would listen to complaints of employees and then --

A: Yes, I was.

Q: Let me finish my question. -- and direct that to the business agent or the shop steward or whomever; is that correct?

A: I think I stated the shop steward.

Q: Okay.

A: I listened to their -- I gave them the crying towel.

[-90-]

* * * * *

Q: Did you file a grievance?

A: Yes, sir, I did. I filed a complaint, I should say. And on that complaint, the -- when I turned it in to my business agent, which was John Polozzo, he said it was written up incorrectly and he changed that.

I might still have a record of that at home. I will see if I can get that. And --

Q: Before you go on, did you fill out the complaint in your own handwriting?

A: Yes.

Q: Where did you get the complaint form?

A: Down at the Union.

Q: Okay. And when you filled that out, did you ask Mr. Polozzo for assistance when you first filled it out?

A: Um, no. I -- I might have gone down there and talked to him, yes.

[-93-]

Q: But did you fill it out in your own hand?

A: And another business agent.

Q: Did you fill it out in your own hand?

A: Yes, I did.

Q: Okay. And then you provided it to Mr. Polozzo?

A: Yes.

* * * * *

Q: How did you know about going down to pick up a form at the Union Hall? Who told you that such forms existed?

A: The union stewards.

Q: Stewards plural?

A: Yes.

Q: More than one told you this?

A: Well, they all know it. I will say Elvis Lutrell.

Q: You don't know?

[-94-]

MR. LYNCH: Objection. Its going to be a continuing objection, so I don't have to keep interrupting.

MR. BONSALL: Good.

MR. LYNCH: The objection is there are complaints that have to be filed and notices of protests that have to be filed. So far you've been discussing only complaints. There's been no discussion about his knowledge as to the filling out of notices of protest, what he knew about that, whatever was done, who's responsibility it is.

With that understanding, that is a continuing objection as to you question (sic. Probably questions.) being vague. Proceed.

MR. BONSALL: Sure.

Q: Since your counsel's given me all sorts of ideas, why don't you tell me what your understanding is about how the grievance procedure works.

A: Grievance works?

Q: Yeah.

A: Best of my knowledge --

MR. LYNCH: Object as vague as to time. I think the relevant point in time is what he understood the

grievance procedure to be on the date he went into the union -- with respect to the present transaction.

Q: MR. BONSALL: Start with the first grievance

[-95-]

that you were talking about,. What did you understand the grievance procedure to require or to be at this particular time?

MR. LYNCH: Vague. You say "this first grievance." Are you talking about his original handwritten grievance that he wrote up in this transaction, or are you talking about a grievance that he wrote up back with Transon or P.I.E.?

*****

Q; MR. BONSALL: Talking about P.I.E. . . . . 1988.

*****

Q: What did you understand the grievance process to be at that time?

A: I understood it -- if it was -- if I thought it was wrong, I went down to the local union, talked to my business agent, told him what went on and asked him if he thought that we could share the file and go through

[-96-]

the grievance procedure.

*****

Q: What's the time limit for doing that?

A: Time limit is ten days, I believe for a money claim.

[-97-]

* * * * *

Q: When was the second grievance filed?

A. I -- when was the second one? 1989 I believe.

Q: And what was the substance matter, subject matter of that grievance?

A: It was -- I don't really recall exactly what it was. It was something to do with piggybacks. Running freight down to the railroad yards instead of using drivers to deliver the freight they were using.

Q: Did you personally file the grievance?

A: No, sir.

[-98-]

* * * * *

Q: The time period that you served as an assistant shop steward, were there any others besides this Sacramento, Reno, Oakland run dispute that you personally filed the complaint?

A: I cannot remember. To the best of my knowledge

[-100-]

that's it.

Q: Okay.

A: Like I said, I was only an assistant.

* * * *

Q: Did you ever serve as an assistant shop steward at any time before -- after that date on behalf of Local 150?

A: No.

Q: Did you ever serve as a shop steward at any time for Teamsters Local 150?

* * * * *

A: No.

[-102-]

(2)

No. 93-1717

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

October Term, 1993

GERALD SNYDER,

Petitioner,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE; CONSOLIDATED FREIGHTWAYS, INC., a California Corporation; and CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL 150, an Unincorporated Labor Organization,

Respondents.

On Petition For a Writ of Certiorari To
The United States Court of Appeal
For the Ninth Circuit

JOINT OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ISSUES ON APPEAL

A. Whether Collective Bargaining Agreements Are To Be Interpreted for the Benefit of an Individual Union Member Under Rules Regarding Third-Party Beneficiary Claims

B. Whether Plaintiff Raised a Triable Issue of Fact Regarding the Correct Calculation of Tours of Duty Under the National Master Freight Agreement ("NMFA")

C. Whether Plaintiff Raised a Triable Issue of Fact Regarding Consolidated's Alleged Breach of the Collective Bargaining Agreement

D. Whether Plaintiff Raised a Triable Issue of Fact Regarding the Union's Alleged Breach of Its Duty of Fair Representation Under the NLRA

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Restatement (Second) Contracts, § 207 . . . . . 6, 7, 9

I.

STATEMENT OF PARTIES AND JURISDICTION

Defendants concur with plaintiff's statement of the parties and jurisdiction.

II.

STATEMENT OF THE CASE

In August 1990, Consolidated Freightways, Inc. (hereinafter "Consolidated") hired plaintiff Gerald J. Snyder (hereinafter "plaintiff") as a supplemental driver. The terms and conditions of plaintiff's employment were set forth in a National Master Freight Agreement and the Western States Area Supplemental Agreement (hereinafter collectively "NMFA"), a multi-employer collective bargaining agreement negotiated by the International Brotherhood of Teamsters. (Appendix to Snyder's Petition for Writ of Certiorari, (hereinafter "Appendix") at p. 1.)

Pursuant to article 58, section 1(c) of the NMFA, an employer has 30 days after an employee completes 40 tours of duty to perform processing and to notify the union and the employee that the employee does not meet company standards. (Appendix at pp. 16-18.)

Article 58 sets forth no standards or criteria, such as good cause, the company must meet in making its decision not to hire a supplemental driver who has completed 40 tours of duty. (Appendix at pp. 16-18 and 31.)

If the employer fails to give the notice within 30 days after a driver has completed the 40th tour of duty, the driver is placed on a preferential hire list. (Appendix at p. 31.)

Consolidated and plaintiff's union, the Chauffeurs, Teamsters and Helpers Union, Local No. 150 (hereinafter the

"Union"), using the method accepted by both parties to the contract since its inception, calculated that plaintiff completed his 40th tour on December 28, 1990. (Appendix at pp. 3 and 12.)

Plaintiff, without any explanation for the method used, calculated his 40th tour to have occurred on December 5, 1990. (Appendix at pp.3-4, 12 and 13.)

On January 8, 1991, Consolidated gave plaintiff notice that Consolidated would no longer use his services as a driver pursuant to NMFA Section 58. (Appendix at pp. 12 and 31-32.)

On June 21, 1991, plaintiff filed his original complaint, amended October 21, 1991, alleging damages for breach of the collective bargaining agreement against Consolidated and breach of the duty of their representation against his union,

Chauffeurs, Teamsters and Helpers Union, Local No. 150. (hereinafter the "Union"). (Appendix at pp. 1-2 and 10.)

Plaintiff alleges his calculation of the tours of duty should take precedence over the established method of calculation followed by both Consolidated and the Union because he is a third-party beneficiary to the CBA. (Appendix at p. 2.)

Following the close of discovery, defendants Consolidated and the Union brought motions for summary judgment before the Honorable Edward J. Garcia of the United States District Court, Eastern District of California. (Appendix at p. 7-14.) Defendants presented sworn affidavits of union and company officials as well as experienced truck drivers to prove the correct method of calculation of

tours under the CBA. (Appendix at pp. 3, 12-13 and 33-34.)

Specifically, Consolidated and the Union demonstrated that plaintiff had miscalculated his tours by equating several of his "shuttle" dispatches as "turnaround" dispatches, and thus, crediting himself with multiple tours of duty. (Appendix at pp. 3, 12-13 and 33-34.)

On October 16, 1992, Judge Garcia heard oral argument on defendants' motions for summary judgment and ruled that plaintiff had failed to raise a triable issue of fact regarding a breach of contract by Consolidated or a breach of the duty of fair representation by the Union. (Appendix at pp. 7-13.)

On November 10, 1992, plaintiff filed his Notice of Appeal to the United States Court of Appeal for the Ninth Circuit.

Plaintiff's questions on appeal were (1) whether the proper standard for construction of the collective bargaining agreement was to protect the interest of intended third-party beneficiary Union members pursuant to Restatement (Second) Contracts, section 207; (2) whether plaintiff produced sufficient evidence to demonstrate a genuine triable issue of fact with respect to his claim of a breach of duty of fair representation by the Union; and (3) whether plaintiff produced sufficient evidence to demonstrate a genuine triable issue of fact with respect to his claim of a breach of the collective bargaining agreement by Consolidated. (Appendix at 1-5.)

On January 12, 1994, the Ninth Circuit Court of Appeal, Circuit Judges Choy, Schroeder and Noonan, on the record

submitted, affirmed Judge Garcia's granting of summary judgment and held (1) Snyder failed to establish sufficient ambiguity surrounding the technical terms entering into the calculation of tours of duty to justify application of section 207 or reliance on other rules of construction; (2) Snyder's self-serving conception of the public interest conflicts directly with an expressly stated and judicially recognized goal of Congress -- promotion of uniform federal labor law encouraging unions and employers to contract for the final arbitral or judicial resolution of disputes; (3) collective bargaining agreements are not typical third-party beneficiary contracts; therefore, the rule of construction urged by Snyder is inapposite; (4) Snyder failed to raise the triable issue of fact precluding summary

judgment with regard to alleged breach of the notice of termination provisions in the NMFA; and (5) Snyder failed to show a breach of the duty of fair representation by the Union. (Appendix at pp. 1-5.)

Consolidated and the Union now request this Court deny plaintiff's writ and affirm the granting of summary judgment to Consolidated and the Union.

III.

ARGUMENT

A. Summary

Plaintiff's complaint hinges upon the correct calculation of tours of duty under article 58, section 1(c) of the NMFA.

According to plaintiff's calculation, he completed his 40th tour of duty on December 5, 1990. (Appendix at p. 12.)

According to defendants Union and Consolidated, plaintiff completed his 40th

tour of duty on December 28, 1990. (Appendix at pp. 12.)

Plaintiff has submitted no testimony or evidence regarding the correct method of calculating tours of duty under the NMFA. (Appendix at pp. 3 and 13.)

The Union and Consolidated have submitted the sworn declarations of Union official Archie Murrietta, Consolidated representative Richard Alvarez and truck drivers Archie Burkhalter and Jim Thomas which attest to the correct method of calculating tours. (Appendix at pp. 3 and 12-13.)

Plaintiff argues that the NMFA should be interpreted pursuant to the Restatement Second of Contracts, section 207, and state law which protects the interests of third-party beneficiaries. (Petition, Question 1 and p. 12 and Appendix at p.2.)

In essence, plaintiff's argument is that the collective bargaining agreement should be interpreted for his individual benefit even though both parties to the collective bargaining agreement, the Union and Consolidated, agree as to the correct method of calculating tours under the contract. As argued below, such an interpretation is contrary to the public policy of establishing a uniform federal law and established case law under the NLRA.

Both the district court and the Ninth Circuit Court of Appeal held that the Restatement Second is not a proper basis for interpreting a collective bargaining agreement and that plaintiff had failed to raise a triable issue regarding the Union's duty of fair representation or a breach of contract by Consolidated.

The Union and Consolidated now request this Court summarily deny plaintiff's petition and affirm the summary judgment granted by the Eastern District and Ninth Circuit Court of Appeal.

B. Legal Argument

1. The NMFA Should Be Interpreted by Reference to Federal Substantive Law

Plaintiff argues that the NMFA should be interpreted under Restatement Second of Contracts and general public policies against forfeitures and in favor of third-party beneficiaries.

Plaintiff's "self-serving conception of the public interest conflicts directly with an expressly stated and judicially recognized goal of Congress -- promotion of uniform federal labor law encouraging unions and employers to contract for the final arbitral or judicial resolution of

disputes. See, Allis-Chambers Corp. v. Lueck, 471 U.S. 202, 210 (1985)." (Appendix at p. 2.)

Unions and employers would not enter national agreements if each state, or individual employee, was able to interpret the agreement to suit its (his) needs. (Ibid.)

In addition, "the Supreme Court has explicitly held that collective bargaining agreements are not typical third-party beneficiary contracts. (Lewis v. Benedict Coal Corporation, 361 U.S. 459, 468 (1959); Appendix at page 2.) Therefore, the rule of construction urged by plaintiff is inapposite and this Court should affirm the granting of summary judgment.

2. Plaintiff Has Not Raised a Triable Issue of Material Fact Regarding the Correct Calculation of Tours Pursuant to Article 58 of the NMFA

Plaintiff requests reversal of the trial court's finding, and the appellate court's affirmation, that he has not raised a triable issue of material fact regarding the correct calculation of tours of duty under article 58 of the NMFA. Plaintiff's petition should be summarily denied because he cannot raise a triable issue of fact regarding the correct calculation of tours under the NMFA.

The dispute between plaintiff and defendants hinged on application of the terms "shuttle" and "turnaround" dispatchs and their conversion into tours of duty. The Union and Consolidated presented the sworn affidavits of four officials with

varied and considerable experience in the trade, including a union official, a firm representative and two truck drivers attesting to the correct method of calculating tours of duty under the NMFA. In addition, representatives of both Consolidated and the Union submitted affidavits declaring that plaintiff had erroneously double counted shuttle runs within a single shift on four occasions prior to December 8, 1990, and twice thereafter. (Appendix at p. 3.)

On the other hand, plaintiff made summary assertions about the number of tours of duty he earned on each dispatch without explaining his method for calculating tours or even designating tours by type of dispatch. A "'party cannot manufacture a genuine issue of material fact merely by making assertions.'"

(S.A. Impresa de Viacao Aerea Rio Grandense v. Walter Kidd and Company, 690 F.2d 1235, 1238 (9th Cir. 1982); Appendix at p. 3.)

Plaintiff presented no evidence to rebut the affiants' designation of the disputed hauls as shuttle dispatches and consequently differing calculation of the expiration date for Snyder's probationary period. (Appendix at pp. 3-4.)

Therefore, plaintiff failed to raise a triable issue of material fact and summary judgment should be affirmed.

3. Plaintiff Did Not Raise a Triable Issue of Fact Regarding Consolidated's Alleged Breach of the CBA

Article 58 of the NMFA states that an employer has 30 days after an employee completes 40 tours of duty to perform processing and to notify the Union and employee that the employee does not meet

company standards. (Appendix at pp. 16-18 and 31.)

Article 58 sets forth no standards or criteria, such as good cause, the company must meet. The history of bargaining and practice between employers and the Union establishes the company's absolute right to give the notice without providing any reason to the employee. (Appendix at pp. 12 and 31.)

The 30-day processing period is considered probationary and an employee may be terminated with or without cause during this time if the employer determines that the employee fails to meet company standards. (Appendix pp. 12 and 31.)

In opposition to summary judgment, plaintiff presented no evidence to rebut Consolidated's proof that it had an absolute right to terminate plaintiff

within the 30-day probationary period. (Appendix at pp. 3-4.)

Therefore, plaintiff failed to raise a triable issue of fact regarding a breach of contract by Consolidated and his Petition should be summarily denied.

4. Plaintiff Has Not Raised a Triable Issue of Fact Regarding an Alleged Breach of the Duty of Fair Representation by the Union

Plaintiff's third contention that the Union breached its duty of fair representation fails on a number of grounds. Firstly, plaintiff has failed to support a contention that the Union's conduct toward him was " 'arbitrary, discriminatory or in bad faith' " and thus in violation of its duty of fair representation under Dutrisac v. Caterpillar Tractor Company, 749 F.2d 1270, 1272 (9th Cir. 1983), quoting Vaca v.

Sipes, 386 U.S. 171, 190 (1967). (Appendix at p. 4.)

Balancing collective and individual interests in making decisions whether to pursue and individual employee's grievance, unions retain wide discretion and substantial deference from the courts in suits alleging unfair representation. (Banks v. Bethlehem Steel Corporation, 870 F.2d 1438, 1441 (9th Cir. 1989); Johnson v. United States Postal Service, 756 F.2d 1461, 1465 (9th Cir. 1985); Appendix at p. 4.)

Assuming, arguendo, that the Union's conduct was negligent, a proposition plaintiff did not support, mere negligent conduct on the Union's part would not constitute a breach of the duty of fair representation. (Clayton v. Republic Airlines, Inc., 716 F.2d 729, 732 (9th Cir.

1983), Appendix at pp. 4-5.) Provided that the union's decision was in good faith and nondiscriminatory, its processing of plaintiff's grievance need not be error-free. (Peterson v. Kennedy, 771 F.2d 1244, 1254 (9th Cir. 1985), cert. den., 475 U.S. 1122 (1986); Appendix at pp. 4-5.)

Even if the Union failed to file a timely grievance, which, once again, plaintiff failed to substantiate, such failure would not have prejudiced Snyder's rights. To prevail on a claim against a union for breach of its duty of representation, the plaintiff must prove that the duty was breached and that the underlying grievance would have been meritorious. Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151, 165 (1983). (Appendix at p.5.)

Plaintiff did not raise a triable issue of fact as to the merits of his grievance, much less furnish grounds from which a meritorious grievance could plausibly be ascertained. (Appendix at p. 5.)

Therefore, plaintiff's Petition should be denied and the district court's grant of summary judgment should be affirmed.

IV.

CONCLUSION

For all of the reasons set forth above, defendants Union and Consolidated hereby request this Court summarily deny plaintiff's Petition.

Dated: May 24, 1994

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUN 3 1994
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No. 93-1717

In The Supreme Court Of The United States

OCTOBER TERM 1993

GERALD J. SNYDER

PETITIONERS,

VS.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE; CONSOLIDATED FREIGHTWAYS, INC. A CALIFORNIA CORPORATION; AND CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL 150, AN UNINCORPORATED LABOR ORGANIZATION.,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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All parties, and known subsidiaries, are listed in caption.

THE QUESTIONS PRESENTED FOR REVIEW

1. In view of Section 301, Labor Management Relations Act, is Restatement (2nd) Contracts, § 207, an interpretation favoring the public, the proper standard in the construction of a Collective Bargaining Agreement to protect the interests of intended third party beneficiary Union members who have no direct control over the collective bargaining process?

2. Did Appellant produce sufficient evidence to demonstrate a genuine triable issue of fact with respect to his claim of a breach of a duty of fair representation by Union in the failure to timely file a protest?

3. Did Appellate produce sufficient evidence to demonstrate a genuine triable issue of fact with respect to his claim of a breach of the collective bargaining agreement by Consolidated in failing to honor 40 trips?

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In The Supreme Court Of The United States
October Term 1993

GERALD J. SNYDER,

PETITIONER,

VS.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE; CONSOLIDATED FREIGHTWAYS, INC. A CALIFORNIA CORPORATION; AND CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL 150, AN UNINCORPORATED LABOR ORGANIZATION.,

RESPONDENTS.

Petition for Writ of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF

MATTERS UNDISPUTED

Respondents do not dispute the allegations of the Petition with respect to Opinions Below, Jurisdictional Statement, Statutory Provisions Involved, Jurisdiction of the District Court, or the accuracy of the record set forth in the appendix to the petition.

MATTERS OBJECTED TO

Respondents have attempted to recast the issues for which review is sought in terms which do not accurately reflect the points raised by Petitioner in the Petition, then argue on the *false a priori* assumption of issues not properly before the court. Petitioner objects to the issues as framed by Respondents as not relevant.

MATTERS WHICH ARE DISPUTED

Respondents characterization of Article 58 (Opposition, p. 2, ¶ 2) is grossly misleading; Article 58

must read in pari materia with the rest of the contract. As so read, the meaning of the terms are readily apparent. (Pet., App. p., -18-; "Short line", App. p. -21-; "Turnaround Operations", App. p. -21-,.-22-; "Layover", App. p. -22-; "Sleeper Cab Operations", App. p. -22-, -23-; r 21, 1991. While still somewhat vague, using the objective "four corner" test, bolstered by resort to objective rules of construction, rather than the self-serving rules of construction advocated by respondents, an understanding of the terms can be ascertained.

In Opposition, Respondents claim they were "using the method accepted by both parties to the contract since its inception, ..." (Reply, pp. 2-3.) The problem is that the records does not support the contention because Respondents never produced any objective business records evidencing a history or standard in long use prior to the controversy; instead they relied on their own self serving affidavits produced after the controversy and during litigation.

In Opposition, Respondents claim that "Plaintiff, without any explanation for the method used, calculated his 40th tour" citing the Appellate Opinion and the Trial Court Opinion. (Reply, p. 3, ¶ 2) In point of fact, the record reflects that Snyder did tender his manner of calculation. (Pet. App., pp. -24-, -26-.)

Respondents claim "that Petitioner had ... credit[ed] himself with multiple tours of duty" citing Pet. App., pp. -33-, -34-. (Reply, p. 5, ¶ 2.) The fact is the "Tours" cited by Respondents at Appendix Page 34 are indistinguishable from the other tours which are not contested. (See, Pet. App., -24- to -26-.)

REASONS IN REPLY FOR GRANTING WRIT

I.

RESPONDENTS DO NOT ARGUE THE ISSUES RAISED BY PETITIONER, BUT CONFINED THEIR ARGUMENTS TO A SUBJECTIVE INTENT ARGUMENT NEVER

RAISED OR URGED

A. USE OF RESTATEMENT DOES NOT DEFEAT THE NEED FOR A UNIFORM FEDERAL STANDARD.

Respondents claim that "plaintiff's "self-serving conception of the public interest conflicts directly with an expressly stated and judicial recognized goal of congress -- promotion of uniform federal labor law encouraging unions and employers to contract for the ... final resolution of disputes [cite omitted]" and "Unions and employers would not enter national agreements if each state, or individual employee, was able to interpret the agreement to suit its (his) needs" the use of restatement should be rejected. (Reply, 11, 12.)

The argument misses the point because Petitioner never suggested his intent should be the critical means of ascertaining the meaning of a contract, but rather suggested that the judicial process look to an objective standard that could be applied uniformly by all administrative and judicial judges in ascertaining contract intent, thereby achieving a national standard. (Pet., pp. 13-17. Indeed, if Petitioner's approach were used, neither Respondents' affidavits, nor Petitioner's affidavit are relevant to conclusions of law regarding the meaning of the contract unless the decision maker concludes that the contract is vague, and traditional, objective, rules of contract interpretation does not explain the ambiguity, and therefore evidence of contract intent are required to resolve the ambiguity.

The court's rejected this court's approach to the use of restatement in labor disputes, which was erroneous, and therefore, this court ought to take this case to resolve issue, and reject the approach of the lower courts as inconsistent with congressional intent of a uniform standard which adequately fulfills the public policy of protecting union members. (*E.g., Lewis v. Benedict Coal Corp.*, 361, U.S. 459 (1960).)

B. RESPONDENTS HAVE NOT BEEN CANDID WITH THIS COURT AS TO THE "THIRD PARTY BENEFICIARY" THEORY.

Responsent's disingenuous argument that "the Supreme Court has explicitly held that collective bargaining agreements are not typical third-party beneficiary contracts." [cites] Therefore the rule ... is inapposite.... (Reply, p. 12.)" must be rejected.

Petitioner does not raise "third party beneficiary", but a rule favoring "protection of public policy" citing a number of cases from this Court. (Pet., pp. 17-19.) While it is true the court stated that CBAs are not typical third-party beneficiary contracts, it nevertheless looked to the public policy for guidance on contract meaning, interpretation, and enforcement to protect interests not before the court. (Ibid.)

As the respondents have not shown a valid reason why a rule of construction ought not be the uniform national standard, this court should grant the petition and resolve the issue in favor of petitioner.

CONCLUSION

WHEREFORE, for all, or any one of, the foregoing reasons, this court should grant the writ of *certiorari* to the United States Court Of Appeals For The Ninth Circuit, and summarily reverse and remand, or set the matter for briefing and argument.

Dated: May 27, 1994

RESPECTFULLY SUBMITTED,

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